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No. 98-1013

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

RAIZY LEVITIN,

Petitioner,

vs.

PAINEWEBBER, INC.,

Respondent.

LOUIS G. BISSELL, JR.,

Petitioner,

vs.

MERRILL LYNCH & COMPANY, INC., and
MERRILL LYNCH PIERCE, FENNER & SMITH, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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I.

The petition presents a single, straightforward legal question concerning federal preemption of state law:

> In holding that § 9-207(2)(c) of the UCC (of which identical versions have been enacted in all 50 states) was impliedly preempted by federal securities law, notwithstanding (i) the absence of any conflict between § 9-207(2)(c) and any specific provision of the federal securities laws, and (ii) the SEC's express pronouncement that it does not regulate payment of interest to customers on their collateral (as well as a similar pronouncement by the Federal Reserve Board), did the court below ignore the preemption principles established by this Court?

To this issue respondents' brief in opposition devotes four (pp. 10-13) scant pages. Those pages add nothing to the court of appeals' analysis, except adding the startling claim -- one not made by the court below -- that SEC policy *affirmatively* supports respondents retention of interest (pp. 12-13). That claim is made without even a single reference -- not one -- to petitioners' brief, and to the SEC's pronouncement that the issue of interest is to be determined by negotiation between the parties (Pet. App. p. 74a) .

As we demonstrated in the petition, no federal policy directs the allocation of interest between customers and brokers (If, however, such a federal policy did exist, that policy would be controlling). Existing federal policy leaves the matter of interest to the agreement of parties, and § 9-207(2)(c) provides a default rule in that respect. Like the court below, therefore, respondents cannot identify *any* conflict between state and

federal law. This is a crucial defect. The fundamental principle of our constitutional order, reflected in the Rules of Decision Act[1] and the decisions of this Court,[2] is that, absent displacement by a valid federal rule, state law governs.

II.

Rather than provide any additional support for the Second Circuit's preemption holding, respondents seek to persuade the Court that no federal issue of importance is "clearly" presented. Like anti-aircraft gunners, respondents' numerous arguments are thrown upward in the hope that one will hit that target. We examine these arguments briefly to show that they are devoid of merit, and that an important issue of "Our Federalism" has been clearly presented to this Court.

1. Respondents direct the Court's attention to"the facts and procedural history of each case, which are not set forth in the petition . . ." The relevance of their elaborate recitation (pp. 1-6) is nowhere made clear.[3] Nor can it be. In

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[1] 28 U.S.C. § 1652. "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States, in cases where they apply."

[2] *Erie v. Thompkins*, 304 U.S. 64 (1938); *Hannah v. Plumer*, 380 U.S. 460 (1965).

[3] For example, there is a discussion of the difference between "short sales" and "short sales against the box", a difference that (continued...)

this litigation, many issues were resolved against petitioners in the courts below upon which they do not seek review. But the question on which they do seek review is distinct and clearly presented. Respondents' effort to depict this petition as raising only fact-dependent issues is without merit.

2. Respondents argue that certiorari should be denied because there is no circuit conflict. There is no direct conflict in a technical sense, and petitioners have never represented otherwise. But a conflict exists at a much deeper level between the decision below and *SEC v. Lehman Brothers, Inc.*, 157 F.3d 2 (1st Cir. 1998) in their fundamental approach to the relationship between the U.C.C. and federal securities law (Pet. 7-9). What is more, the decision is in (at best) considerable tension with this Court's holding that normally "interest follows principal," *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1930 (1998), a decision that respondents seek to distinguish(p. 8) in a few unresponsive sentences.

3. Respondents point out that the court below referred to this Court's preemption cases, and then rely on Rule 10 for the proposition that "the misapplication of a properly stated rule of law" is "rarely" a ground for the granting of a writ. That language is concerned with the routine application of law to facts -- for example, decisions as to whether there had been an unreasonable search and seizure, or whether the defendant was "in custody" for purposes of the *Miranda* warnings. The language reflects the

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[3](...continued)
the court below said was immaterial for purposes of its holding (Pet. App. p. 23a).

fact that this Court is not a court of errors and appeals whose function includes correcting erroneous judgments. (When, however, the application of law to fact involves the need to further develop legal standards, review is readily granted.[4]) The quoted language has no pertinence whatsoever to issues of the character asserted here: the purely legal issue of whether federal law displaces state law in the absence of some kind of identifiable conflict between the two. This petition is governed by Rule 10(c) because "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court."

4. Finally, respondents attack the standing of petitioners to raise the preemption claims asserting that only an advisory opinion is sought. Their attack is wide of its mark. They insist that the court found that petitioner Bissell "agreed" to respondent's conduct; and then he "contracted out" of any § 9-207(2)(c) protection (*see* pp. 15-16). The court of appeals, in fact, made no such finding (See Pet. App. p. 23a). Had it done so, it would have had no occasion to discuss preemption. With respect to petitioner Levitin, it made no relevant finding at all. Whether or not petitioner Levitin's state law claim sufficiently implicated federal claims (*see* Opp. pp. 14-15), Levitin's state law claims under § 9-207(2)(c) are independent and thus remain open. Thus, with respect to both petitioners, the court concluded that their claims were pre-empted by federal law.

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[4] E.g., *Ornelas v. United States*, 517 U.S. 690, 695-697 (1996).

That determination, and that determination alone, is what this petition seeks to review.

Dated: New York, New York
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Respectfully submitted,

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